Supreme Court, U.S.
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Case No. 88 - 2001

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

NAIFEH & WOSKA
A Professional Corporation

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ATTORNEY FOR PETITIONERS

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PROPOSITION

THE UNITED STATES SUPREME COURT HAS INDEPENDENT SUBJECT MATTER JURISDICTION WHEN DUE PROCESS IS VIOLATED BY THE OKLAHOMA SUPREME COURT'S ARBITRARY AND UNCONSTITUTIONAL APPLICATION OF A STATE PROCEDURAL LAW

The Respondent discusses four (4) means by which due process may be violated and contends that the Silvers have no right of review under any of these theories. Respondent fails to recognize that due process can be violated "by the impact" of a state court's ruling regarding that state's own procedural laws.[1] While it is true that the Silvers do not contest the legitimate purposes served by, nor the basic constitutionality of, the Oklahoma Pleading Code, the Oklahoma Supreme Court Rules, the Insurance Code nor any other applicable set of rules or statutes, the Silvers disagree with the Respondent's assessment that no allegation was presented "that constitutional statutes were unconstitutionally applied to them so as to deny Petitioners unequal [sic] protection"[2] or that no challenge has

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[1]See, Chandler v. Florida, 101 S.Ct. 802, 818, 449 U.S. 560, 581, 66 L.Ed.2d 740 (1981).

[2]Respondent's Brief in Opposition to Petition for Certiorari, page 13.

been made to the denial of "the full panoply of judicial process".[3] On the contrary, the Silvers' appeal rests on the failure of the Oklahoma Supreme Court to apply the legal procedures proscribed and thereby arbitrarily denied due process of law to the Silver family.

The trial court overruled the Respondent's Motion to Dismiss, thereby ruling that the Petitioners' Petition did, in fact, state a claim for relief. The parties were ordered to submit briefs on the issue of uninsured motorist coverage and the trial court treated this order as a motion for summary judgment, ruling in favor of the Respondent. The Silvers' appeal was taken from that ruling, but the Oklahoma Supreme Court arbitrarily utilized procedures which violate basic tenets of due process in construction of the pleading without a further subsequent order for remand to permit Petitioners a required opportunity to amend its pleading. It is this failure to strictly enforce the statutory mandates of the Oklahoma Pleading Code which violates the Silvers' right to due process.

The Silvers agree that the Oklahoma Supreme Court has the sole prerogative to determine issues of state substantive

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[3] Id.

law,[4] by which a federal court is usually bound, and cannot correct.[5] Such authoritative interpretation is said to be made part of the statute "as if it had been amended by the legislature".[6] However, the facts of the case at bar do not involve a state substantive issue of law but, rather, entails a procedure which violates basic tenets of justice and fair play. The Oklahoma Pleading Code adopts and incorporates the fundamental aspects of the federal pleading code.[7] The rules are not "peculiar to the State" of Oklahoma nor entail any

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[4]Wakinekona v. Olim, supra.

[5]Tarr v. Manchester Ins. Corp, 544 F.2d 14 (1st Cir. 1976).

[6]Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982), quoting Winters v. New York, 68 S.Ct. 665, 669, 333 U.S. 507, 514, 92 L.Ed. 840 (1948).

[7]Introductory Committee Comment to the Oklahoma Pleading Code, OKLA. STAT., tit 12, §§ 2001 et seq.

> In order to take fullest advantage of the case law interpreting the Federal Rules and the Advisory Notes, the Oklahoma Pleading Code tracks the Federal Rules closely. Where the text of the Federal Rules has been adopted in the Oklahoma Pleading Code, the construction placed on it by federal and state courts should be presumed to have been adopted as well. See, Laubach v. Morgan, 588 P.2d 1071, 1073 (Okla. 1978); Baker v. Knott, 494 P.2d 302, 304 (Okla. 1972).

variance between particular words.[8] The facts of the present case do not support the rule that the state has the prerogative to enforce a particular state law. Even if such were the case, the state must comply with the federal due process requirements since "[s]tate courts are obligated to enforce applicable federal law."[9]

Respondent suggests in the heading of Subproposition "A"[10] that the Oklahoma Supreme Court's decision is based upon independent and adequate state grounds and, therefore, should be precluded from review. Certainly, the state is given the power to promulgate and enforce laws according to the wishes of the citizens of that state, and, if the judgment below rests on independent and adequate grounds, this Court would

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[8]Respondent's Brief in Opposition, p. 12, citing Duncan v. Tennessee, 92 S.Ct. 785, 405 U.S. 127, 31 L.Ed.2d 86 (1972), involving two state criminal statutes which differentiate between robbery using a "rifle" and robbery using a "pistol".

[9]Wakinekona v. Olim, 664 F.2d 708, 715, cert. denied, 102 S.Ct. 2294, 456 U.S. 1005, 73 L.Ed.2d 1299, reversed, 103 S.Ct. 1741, 461 U.S. 238, 75 L.Ed.2d 813, on remand, 716 F.2d 1279 (9th Cir. 1981), citing U.S. CONST. Art. VI, cl. 2.

[10]Respondent's Brief in Opposition, page 11.

have no jurisdiction to decide the questions before it.[11] However, even though the state has a legitimate interest in enforcing its procedural rule,[12] the procedural ground is not "adequate" unless the rule is strictly and regularly enforced and provides federal constitutional safeguards.[13]

The Oklahoma Supreme Court has failed to apply the law first set out in Conley v. Gibson,[14] as well as the Oklahoma Pleading Code, which states that technical pleading form is not required in order to give "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[15] The "fundamental requirement of civil procedure [is that] '[a]ll pleadings shall be so construed as to do substantial justice.'"[16]

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[11]Zacchini v. Scripps-Howard Broadcasting Co., 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965, on remand, 376 N.E.2d 582, 54 Ohio St.2d 286, 8 O.O.3d 265 (1977).

[12]Michigan v. Tyler, 98 S.Ct. 1942, 436 U.S. 499, 56 L.Ed.2d 486 (1978).

[13]Hathorn v. Lovorn, 102 S.Ct. 2421, 457 U.S. 255, 72 L.Ed.2d 824, reh'g denied, 103 S.Ct. 15, 458 U.S. 1131, 73 L.Ed.2d 1401 (1982), citing Barr v. City of Columbia, 84 S.Ct. 1734, 378 U.S. 146, 149, 12 L.Ed.2d 766 (1964).

[14]78 S.Ct. 99, 355 U.S. 41, 2 L.Ed.2d 80 (1957).

[15]Conley v. Gibson, 355 U.S. at 47.

[16]Silver v. Slusher, 770 P.2d 878, 887 (1988), J. Wilson dissenting, citing OKLA. STAT. tit. 12, § 2008(F).

The touchstone of due process is protection of the individual against arbitrary action of government[17] and the United States Supreme Court has supervisory jurisdiction over state courts to evaluate the judgment in relation to the federal Constitution.[18] If the state's procedure cannot pass constitutional muster, as when the interpretation is unconstitutionally arbitrary,[19] or is "inconsistent with fundamental principles of liberty and justice",[20] review of the interpretation is within the authority of the United States Supreme Court.[21] Where the state court has erred, the proper forum for appeal is the United States Supreme Court.[22]

CONCLUSION

In the present case, the Oklahoma Supreme Court has

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[17]Daniels v. Williams, 106 S.Ct. 662, 474 U.S. 327, 331, 88 L.Ed.2d 662 (1986), quoting Dent v. West Virginia, 9 S.Ct. 231, 129 U.S. 114, 123, 32 L.Ed. 623 (1889).

[18]Chandler, supra.

[19]Muench v. Israel, 14 F.Supp. 1194, aff'd, 715 F.2d 1124, cert. denied, Worthing v. Israel, 104 S.Ct. 2682 (E.D. Mich. 1981).

[20]Ewing v. Winans, 749 F.2d 607, 609 (10th Cir. 1984), citing Silva v. Fox, 351 F.2d 61 (10th Cir. 1965).

[21]Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981).

[22]Aristocrat Health Club of Hartford, Inc. v. Chaucer, 451 F.Supp. 210 (D. Conn. 1978).

followed a procedure which is not only arbitrarily applied but is also so interwoven with a federally protected right as to afford an independent ground for United States Supreme Court review.[23] Federal courts will have subject-matter jurisdiction over the procedural due process claims arising under the federal constitution.[24] This Court maintains power to correct such judgment to the extent it is in conflict with the due process clause.[25] Since the Oklahoma Supreme Court rendered an opinion based upon a dismissal for failure to state a claim for relief, that court should have also taken appropriate action to remand the issue and allow the Silvers the opportunity to amend their pleading as required by Oklahoma law.

By: _____

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[23]Ohio v. Johnson, 104 S.Ct. 2536, 467 U.S. 493, 81 L.Ed.2d 425, reh'g denied, 105 S.Ct. 20 (1984).

[24]Sarfaty v. Sarfaty, 534 F. Supp. 701 (E.D. Pa. 1982); Johnston v. Shaw, 556 F.Supp. 406 (N.D. Tex. 1982).

[25]Tibbs v. Florida, 102 S.Ct. 2211, 457 U.S. 31, 72 L.Ed.2d 652 (1982).

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Respectfully submitted this _____ day of September, 1989.

PROOF OF SERVICE

I, Clifton D. Naifeh, Counsel of Record for Randall and Mikala Silver, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of September, 1989, I served a copy of the foregoing PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI to the Supreme Court of the United States on Farmers and Merchants Insurance Company, the Respondent herein, by delivering a copy thereof to Jim W. Lee, Esq., attorney of record for the Respondent, at his office located at 2728 N.W. 39th Street, P. O. Box 1907, Oklahoma City, Oklahoma, 73157-7320.

CLIFTON D. NAIFEH